"It is true that § 6046 fixes no appearance day for the notice, but the general rule requiring an act to be done in a reasonable time where no time is fixed should be applied to the case . . . In the case in judgment, the plaintiff had not only passed over a term of court, but had exceeded the limit prescribed by § 6055 by 48 days, or about 7 weeks. If he may exceed it by 7 weeks, why not by 7 months, or 7 years? Where shall the limit be fixed? Unless the limit prescribed by the statute to 'process from any court' be adopted, we are hopelessly at sea as to how to measure 'reasonable time.' "

This is the first time that this particular point has arisen in Virginia, but there are several cases cited in the opinion which show that the two methods of procedure are closely analogous. The decision seems eminently sound on principle and the opinion of Judge Burks is exceedingly well reasoned and lucid. With the ever increasing use of notice and motion this point becomes of more and more vital importance, and it was thought well to call the attention of the profession to this recent case settling the question in Virginia.

R. Y. B.

THE THREE CORNERED PRIORITIES PUZZLE.—When A has a lien on property prior to B's lien on the same property, and C has a lien prior to A's but subordinate to B's, the relative priorties of the parties have occasioned the text-writers and those courts which have had the misfortune to be confronted with the question much difficulty, producing conflicting conclusions.

This situation may arise in a great many ways. For instance, under our modern registry laws, suppose A to have a deed of trust lien on Blackacre which he has not recorded. With actual knowledge of A's lien, B now takes a deed of trust of the same property, which he at once records. Because of knowledge, this lien is subordinate to A's unrecorded lien. Next, C takes a deed of trust on the same property. C is subordinate to B, because B's deed is recorded, but prior to A, because A's deed is unrecorded. In what order of priority, then, should the property be divided, supposing it not sufficient to satisfy all three liens?

The Virginia Court has decided that C being prior to A, and B being prior to C, B shall also be made prior to A, so that A, who was first in point of time of execution is now placed last when it comes to recovery.[1]

Thus, suppose Blackacre to be worth $7,000 and the lien of each party $5,000. Before C came in, A would have gotten $5,000 in full and B only $2,000. Now B gets $5,000 and C $2,000, while A gets nothing.

Or suppose Blackacre worth $5,000. A would, before the advent of C, have gotten all and B nothing. Now B gets all and A and C nothing.

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[1] Hill *v.* Rixey *et al*, 26 Gratt. 72 (1875).

Or suppose Blackacre worth $10,000. Before C became involved, the liens of A and B would have been fully satisfied. Now B and C are satisfied in full, while A gets nothing.

This was also the rule laid down by Lord Hardwicke in *Ingram* v. *Pelham.*[2]

Now we have a quarrel with these conclusions. Our position would be stated with diffidence did we not find support in the very distinguished authority which we shall presently call to our aid.

Before we announce our conclusions, we will lay down the following unassailable premises, viz.:

1. A vested right of a party, in the absence of negligence or some act of estoppel on his part, cannot be taken away from him nor diminished in value, without his consent, by any act of another.

2. Neither can the relation of this vested right to the property in which it is a right be improved by an act of a stranger seeking to further encumber the property.

3. When A and B come into relations with each other regarding the property of their common debtor, their relations and rights become at once fixed and no act of a third person, C, can change this relation of A and B *as to each other.* Of course, if either of these original parties be negligent, or otherwise estop himself, he forfeits his rights to C to that extent. But his relation to the other original party cannot, in the very nature of things, be thereby altered.

Now in the situation we have before us, A has estopped himself to claim against C, but he has not estopped himself as against B. Nor has B estopped himself against anyone. B's situation became fixed and static at the time he recorded his deed and nothing that anyone else can do thereafter can alter it for better or worse.

We submit that whatever B had a right to against Blackacre, or out of its proceeds, before the advent of C, he still has the right to, no more and no less. We submit, further, that whatever A had a right to before C came in he still has the right to, subject now only to the extent of the prior equity of C, due to A's failure to record his deed as required by law. Finally, we submit that C's claim against Blackacre is subject only to the recorded deed of B. As B, then, is the only one whose rights have remained unchanged from the beginning, we will begin the division by giving him his part, whatever that is in *right,* which may or may not be equal to the face value of his *claim.* We do not mean by this to give B any priority over A, as will be seen later. Next we should satisfy C's *claim* as far as the remaining proceeds will go, and if anything is left after that it would, of course, go to A.

Now what were B's *actual* rights against Blackacre before C came in? In all three of the illustrations above, his deed was intended to secure $5,000, but his lien varied in *actual* value according as the supposititious value of Blackacre was $7,000, $5,000, or $10,000. This is the vital distinction, we think, that has been overlooked by the Virginia Court. It has confused the *face* value of B's lien with its *actual* value. Again, take the situation before C

[2] 1 Ambl. 153, 27 Eng. Rep. R. 102 (1752).

came into it. Blackacre being worth $7,000, the liens of both A and B being each $5,000 and A's lien being prior, B's lien is *actually* worth only $2,000. Value Blackacre at $5,000 and B's lien has no *actual* value. Value Blackacre at $10,000 and the *actual* value of B's lien is the same as its *face* value. How can the subsequent lien of C, a stranger, increase the value of B's lien in any of these cases?

We proceed, then, to apply our principles to the distribution of the proceeds of Blackacre in the manner above suggested. Take the first case, Blackacre valued at $7,000. The *actual* value of B's lien being $2,000, this amount is given him, leaving $5,000 between A and C. But as C is prior to A, C takes all of this and A gets nothing. Second case, Blackacre valued $5,000. Here B's lien has no *actual* value. The whole $5,000 is thus left to A and C, and C, having priority over A, takes it all. Third case, Blackacre valued $10,000. *Actual* value of B's lien here is $5,000, leaving $5,000, just enough to satisfy C in full. The *result* in this third case is the same that would be reached by the application of the Virginia rule, *because here the face value of B's lien and its actual value are equal.*

In the first case C is better off under our rule by $3,000; in the second case by $5,000, while B is correspondingly worse off than he would be under the Virginia rule. But in neither case can B complain, since he gets exactly what he would have gotten if C had never come in at all. He cannot complain if C gets something he, B, had no right or title to.

A is no better off in these three cases under our rule than he would be under the Virginia rule, as he gets nothing under either rule. This is merely the result of the values we have set on Blackacre and the various liens. Our rule postpones A as to C only and not as to B. This will be demonstrated by a fourth illustration. Blackacre $8,000; A's lien $5,000; B's lien $5,000; C's lien $3,000. Here the *actual* value of B's lien was only $3,000. Give him this and it leaves $5,000, of which C gets $3,000 and A the remaining $2,000. Under the Virginia rule, B would here get his entire $5,000, C would get $3,000 and A would get nothing.

Our position herein is supported by the New Jersey court in two decisions,[3] and also by the opinions of two distinguished members of the Virginia Bar.[4]

In a later analogous case [5] the Virginia Court was not quite consistent. A held a judgment lien against X, which he failed to docket. B also held a judgment lien which he properly docketed, but which was subordinate to A. Both these judgments were, of course, liens

[3] Hoag *v.* Sayre, 33 N. J. Eq. 552 (1881); Clement *v.* Kaighn, 15 N. J. Eq. (2 McCart.) 47 (1862).

[4] Prof. John Randolph Tucker, 1 Va. Law Reg. 4 (1895); Edmund Pendleton, 12 Va. Law Journal, 424 (1888).

[5] Gurnee *v.* Johnson, 77 Va. 712 (1883). It may not be unworthy of comment that in this case Mr. Pendleton and Mr. Tucker, with whom was associated the late Maj. Jno. W. Daniel, were opposing counsel, Mr. Pendleton maintaining the principle supported by his later article, *supra*, note 4, and Mr. Tucker opposing this principle which he also contended for in his later able argument, *supra*, note 4.

on all the real estate of X. Later C purchased a portion of X's land. His deed was, therefore, subordinate to B's docketed lien but prior to A's undocketed one. It was held that A could not subject the land aliened to C but that he could subject all the land not so aliened, and this although the direct result was to throw B over against C's purchase and subject it all under his, B's, docketed lien.

With all due deference to the learned judge who wrote the opinion, we believe that the decision was wrong. The result was inequitable because it made C, a bona fide purchaser for value, suffer for A's negligence in failing to docket his judgment. If the unaleined land was sufficient to satisfy his claim, A escaped all the normal consequences of his own negligence. Such a result is contrary to the spirit and purpose of our registry laws. When C purchased a portion of X's land he knew, and could know, only of B's docketed judgment. To the lien of this judgment he was subordinate. But he bought with the assurance that the land remaining in X's possession was ample to satisfy this lien.

What then, were C's rights? Undoubtedly to have all of X's unaliened land subjected to B's judgment before the portion purchased by him could be taken for that purpose. There is, furthermore, an equitable doctrine to the effect that where one of two innocent persons must suffer from the wrong of a third, that one must suffer who, through his conduct or negligence, made the wrong possible. Here A, by his negligence in failing to docket his judgment as required by statute, made it possible for X to commit the wrong of selling his encumbered land to C, a bona fide purchaser. Yet the court held that the bona fide purchaser, not the negligent judgment creditor, must suffer the consequences of the creditor's negligence. Twist the law as you will, the stubborn fact remains that A's negligence was the direct cause of C's injury. Clearly the holding worked injustice. The spirit and purpose of the registry laws were defeated. Under this holding, who can purchase real estate in Virginia and absolutely know that he is safe, whatever his diligence to discover prior encumbrances?

It must be recognized that the decision is upheld by two earlier West Virginia decisions.[6] Nevertheless, we believe that the careful application of the rule contended for in this article and laid down by the New Jersey court [7] would have avoided the inequities worked by the actual decision, and, through the granting of complete justice to all parties, have resulted in the vindication of the registry laws.

H. F. W.

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[6] Renick *v.* Ludington, 14 W. Va. 367 (1878); McClaskey & Crim, *et al. v.* O'Brien, *et al.*, 16 W. Va. 791 (1879).

[7] *Supra*, note 3.